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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NATIONAL ENTERPRISES, INC. et al.,	
Plaintiffs and Appellants,	E046937
v.	(Super.Ct.No. 730011)
CITY OF SAN DIEGO,	OPINION
Defendant and Respondent.	

APPEAL from the Superior Court of San Diego County. Linda B. Quinn, Judge. Affirmed in part; reversed in part with directions.

Niddrie, Fish & Buchanan, Michael H. Fish; Thorsnes, Bartolotta & McGuire, Vincent J. Bartolotta, Jr.; Wasserman, Comden & Casselman, David B. Casselman; Ward & Ward and Alexandra S. Ward for Plaintiffs and Appellants.

Office of the City Attorney, Andrew Jones; Latham & Watkins, Kristine L. Wilkes, Katherine Mayer, Michael Pulos and Patricia Guerrero for Defendant and Respondent.

In this case and two companion cases—*Otay Acquisitions LLC v. City of San Diego*, E046939, and *Border Business Park, Inc. v. City of San Diego*, E046940—the plaintiffs sued the City of San Diego (hereafter the City) for breach of a development agreement pertaining to property in Border Business Park in Otay Mesa and for inverse condemnation. In all three cases, we address the plaintiffs' contentions that the trial court incorrectly sustained the City's demurrers without leave to amend. In this case, we reverse as to the causes of action for mandate and breach of contract, but affirm the judgment as to the cause of action for inverse condemnation.[1]

BACKGROUND

In reviewing a judgment based on an order sustaining a demurrer, we take the underlying facts from the complaint and from documents subject to judicial notice. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 734, fn. 2 (*City of Stockton*).) Here, we take the underlying facts from the second amended petition for writ of mandate and complaint, hereafter referred to as the complaint. This case is factually related to our earlier decision in *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538 (Fourth Dist., Div. Two) (*Border v. San Diego*), and we have also drawn some of the underlying facts from that decision.

[1] Although all three cases present similar issues, there are significant differences among the three which render it impractical to consolidate them. For that reason, we deny the plaintiffs' joint motion for consolidation.

In 1986, the City entered into a development agreement with a real estate developer, Border Business Park, Inc. (hereafter Border). The agreement applied to a 312-acre tract of land in Otay Mesa which Border sought to develop into a business park. The contract provided, among other things, that for the duration of the 21-year term of the agreement, the City would not apply, either to Border or to any subsequent purchaser of property within the business park, any later-enacted laws which would restrict or prevent development within the park. (The underlying history of this agreement is set forth in more detail in our opinion in *Border v. San Diego*, *supra*, 142 Cal.App.4th at pp. 1544-1546.)

Allegedly as a result of breaches of the agreement by the City and of actions by the City amounting to inverse condemnation which impaired Border's ability to sell or lease properties within the business park, Border lost a number of parcels in foreclosure and incurred other damages. Border sued the City for breach of contract and for inverse condemnation based on the City's conduct with regard to its plans to relocate San Diego's international airport to Otay Mesa and on its rerouting of truck traffic in a way which interfered with the easement of access to the business park; the City cross-complained for fraud, unfair business practices and breach of contract.[2] The trial court ruled that the City's actions concerning the airport development plan and the rerouting of

[2] Border also asserted at trial that the rerouting of truck traffic resulted in a degree of noise, dust and fumes generated by idling trucks which was "'not far removed from a direct physical intrusion'" or which constituted a nuisance. That theory was not submitted to the jury, however. (*Border v. San Diego*, *supra*, 142 Cal.App.4th at pp. 1559-1560.)

truck traffic constituted inverse condemnation. The issue of damages for inverse condemnation was submitted to a jury, as were Border's claim for breach of contract and the City's claims.[3] The jury returned a verdict against the City on its cross-complaint and in favor of Border on all of its claims. It awarded Border approximately $29 million for breach of contract and $65 million for inverse condemnation. The City appealed the judgment in favor of Border, and Border appealed the order granting the City a new trial on Border's breach of contract claim. The City did not appeal the judgment in favor of Border on the cross-complaint. (*Border v. San Diego*, *supra*, 142 Cal.App.4th at pp. 1543-1544, 1546.) We reversed the judgment for inverse condemnation, holding that the evidence was insufficient as a matter of law both as to the airport inverse condemnation cause of action and as to the easement of access cause of action. (*Id*. at pp. 1546-1551, 1551-1560.) We affirmed the trial court's order for a new trial on Border's breach of contract claim and remanded the cause to the trial court for further proceedings. (*Id.* at pp. 1560-1567.)

In 1997, after Border had lost a number of its properties as described above and while its lawsuit in *Border v. San Diego* was pending, National Enterprises, Inc. (hereafter National) acquired several parcels within the business park at a public foreclosure sale or through transactions independent of foreclosure. As a purchaser of

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[3] In a claim for inverse condemnation, the court determines whether the public entity's actions constitute inverse condemnation and the jury determines damages. (*Border v. San Diego*, *supra*, 142 Cal.App.4th at p. 1546, fn. 6.)

property within the business park, it was entitled under the terms of the development agreement and by statute to the benefit of the agreement. (Gov. Code, § 65868.5.)[4] On April 16, 1999, National presented a claim to the City pursuant to the Government Claims Act (§ 900 et seq.), alleging a number of breaches of the development agreement.[5]

After first notifying National that its claim was deficient for failure to comply with the Government Claims Act, the City denied the claim on June 1, 1999. National then filed its petition and complaint for mandate and for damages against the City, alleging inverse condemnation and breach of the development agreement. National's suit was stayed while the litigation between Border and the City was pending.

While the suit was stayed, National continued to attempt to develop and utilize its land within the business park. Its lenders required it to create "special purpose entities" for financing purposes.[6] National transferred title to its properties in the business park to

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[4] Government Code section 65868.5 provides, in part, that "[t]he burdens of [a development agreement] shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement." (All further statutory citations refer to the Government Code unless another code is specified.)

[5] The informal short title of this act is the "Tort Claims Act." However, because the act applies to claims for breach of contract as well as to tort claims, the California Supreme Court has elected to refer to it as the "Government Claims Act." (*City of Stockton*, *supra*, 42 Cal.4th at p. 734.) We do likewise. We also refer to it sometimes as "the claims act" or simply "the Act."

[6] According to the opening brief, a special purpose entity is a recognized form of business entity which is "unlikely to become insolvent as a result of its own activities and which is adequately insulated from the consequences of any related party's insolvency." They are separate legal entities "distinct from any other person or entity," which are

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the special purpose entities—Otay Mesa Property LP, a limited partnership; Otay Truck Parking LP, a limited partnership; and OMC Properties LLC, a limited liability company. It also assigned its claims against the City to the special purpose entities.

On April 23, 2007, a second amended petition and complaint was filed.[7] The complaint sought a writ of mandate to compel the City to approve the final map for a

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created solely for the purpose of obtaining loans which are being made as part of portfolios for commercial mortgage-backed securities. They are typically corporations, limited partnerships and limited liability companies. (See <http://en.wikipedia.org/wiki/Special_purpose_vehicle> [as of May 18, 2010].)

[7] Although the caption of the second amended complaint continues to list only National as the plaintiff, the complaint in fact seeks relief only on behalf of the special purpose entities.

To the extent that the special purpose entities' claims are derivative of National's claims, they may prosecute the action in National's name: Code of Civil Procedure section 368.5 provides, "An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." Accordingly, a property owner may continue to prosecute a claim pertaining to real property first brought by his or her predecessor in interest, either under his or her own name or under the name of the predecessor (*Zimberoff v. Bank of America* (1952) 112 Cal.App.2d 555, 557 [citing Code Civ. Proc., former § 385]), as may an assignee of a claim (see *California Coastal Com. v. Allen* (2008) 167 Cal.App.4th 322, 324).

However, as we discuss in a subsequent portion of this opinion, to the extent that the special purpose entities are seeking damages for breaches of the agreement which occurred only after they took title to the properties, their claims are not derivative of National's. Consequently, although it is proper for the complaint to continue to name National as the nominal plaintiff with respect to the assigned claims, it would have been a better practice to amend the complaint's caption to reflect that the special purpose entities are also plaintiffs in their own right. It would also have been better practice, and would have facilitated our review of the issues, if the complaint had clearly distinguished between the claims the special purpose entities are pursuing as successors in interest/assignees of National and the claims which arose only after the special purpose

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specific section of the business park property, without conditions, and to invalidate certain conditions imposed by the City, allegedly in contravention of the development agreement. It also sought damages for breach of contract and for inverse condemnation. The sole theory of inverse condemnation alleged in the complaint is that the City's actions in rerouting truck traffic "around and through the Business Park . . . is not far removed from a direct physical invasion, and amounts to a nuisance."

The City demurred. It contended that the complaint failed to state a cause of action for mandate, in that it failed to allege both lack of adequate legal remedies and exhaustion of administrative remedies. It contended that the complaint failed to state a cause of action for breach of contract because it failed to allege compliance or excuse from compliance with the Government Claims Act. It also contended that our opinion in *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538 establishes, as a matter of res judicata, that the development agreement does not waive compliance with the Government Claims Act. Finally, it contended that the complaint failed to state a cause of action for inverse condemnation because that claim was barred as a matter of law by the res judicata effect of our opinion in *Border v. San Diego*.

The trial court sustained the demurrer without leave to amend, and a judgment of dismissal with prejudice was entered on April 10, 2008. The court awarded the City

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entities obtained title to the properties formerly owned by National, and to specify the breaches which affected each of the plaintiffs.

All further references to "plaintiffs" refer to the special purpose entities.

attorney fees in the amount of $999,552.33. Plaintiffs filed a motion for new trial, which was denied. Plaintiffs filed a premature notice of appeal, which was accepted by Division One of this court on May 21, 2008. The cause was later transferred to this court.

LEGAL ANALYSIS

STANDARD OF REVIEW

In an appeal from a judgment based on an order sustaining a demurrer for failure to state a cause of action, the reviewing court treats the demurrer as admitting all material facts properly pleaded and, giving the complaint a reasonable interpretation, independently determines whether the complaint states a cause of action under any legal theory. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) Because a demurrer raises only questions of law, "'an appellant challenging the sustaining of a general demurrer may change his or her theory on appeal [citation], and an appellate court can affirm or reverse the ruling on new grounds. [Citations.] After all, we review the validity of the ruling and not the reasons given. [Citation].'" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1396-1397.) We review the decision to sustain the demurrer without leave to amend for abuse of discretion. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) If there is a reasonable possibility that the defect can be cured by amendment, leave to amend must be granted. (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, at p. 39.) Leave to amend may be granted on appeal, even if it is not requested by the

plaintiff. (*City of Stockton, supra*, 42 Cal.4th at p. 746; Code Civ. Proc., § 472c, subd. (a).)

THE BREACH OF CONTRACT CLAIM

Introduction

The Government Claims Act provides a mandatory procedure for the presentation of "all claims for money or damages against local public entities," subject to some exceptions.[8] (§§ 905, 910 et seq.) This includes claims for breach of contract. (*City of Stockton, supra*, 42 Cal.4th at pp. 737-738.) Presentation of a claim which complies with the provisions of the Act is a prerequisite to the filing of a lawsuit seeking money or damages from a public entity. (§ 945.4.) Furthermore, compliance with the Act's claim presentation procedure is an element of a cause of action for damages against a public entity. Consequently, failure to allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a complaint to a general demurrer. (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1237, 1239-1245.)

The trial court sustained the demurrer as to the breach of contract claim because plaintiffs did not present a Government Code claim of their own but instead relied on the Government Code claims of the "original" plaintiff and petitioner, i.e., National; because the allegations of the complaint "vary fundamentally" from the allegations of National's claim; and because National's claim is defective in any event because it fails to allege the

[8] One exception is claims for inverse condemnation. (§ 905.1.) Consequently, we will discuss the order sustaining the demurrer as to the inverse condemnation cause of action separately.

date of the breach as required by section 910. The court also ruled that plaintiffs were precluded by the decision in *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538, from arguing that the development agreement waived compliance with the Government Claims Act or that the City otherwise waived compliance with the Act. Finally, the court held that the development agreement does not excuse compliance with the Act. Plaintiffs contend that each of these rulings was erroneous.

Collateral Estoppel Does Not Bar Litigation of the Waiver Issue

We first address the trial court's ruling that plaintiffs are barred by principles of res judicata or collateral estoppel from litigating their claim that the development agreement waives compliance with the Government Claims Act because we decided this issue adversely to Border in *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538.

Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*).) It may also be applied to prevent relitigation of a legal theory or factual matter which could have been but was not asserted in support of or in opposition to an issue which was litigated. (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202.) In *Border v. San Diego*, we held that because Border could have raised the argument that the development agreement waives compliance with the Government Claims Act in response to the City's demurrer in a prior case, *City of San Diego v. De La Fuente Business Park*[9] (Super. Ct. San Diego County,

[9] Border Business Park changed its name to De La Fuente Business Park in 1987 and then changed its name back to Border Business Park in 1997. (*Border v. San Diego*, *supra*, 142 Cal.App.4th at p. 1561, fn. 19.)

1995, No. 676625), but did not do so, it was barred from raising that argument in *Border v. San Diego*: "Any of the contentions Border now asserts could have been raised in its opposition to the demurrer [in *City of San Diego v. De La Fuente Business Park*, *supra*]. The order sustaining the demurrer therefore precludes consideration of those contentions at this juncture." (*Border v. San Diego*, *supra*, 142 Cal.App.4th at pp. 1565-1566.)

Collateral estoppel applies not only to the actual parties to the prior litigation but also to those in privity with them. (*Lucido*, *supra*, 51 Cal.3d at p. 341.) The City contends that plaintiffs are in privity with Border because they are Border's successors in interest with respect to the property, both as property owners and as assignees of National's claims.

In the context of collateral estoppel, the concept of privity generally refers "'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel. [Citations.]' [Citations.]" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1069-1070 (*Citizens for Open Access*).) As successors in interest to Border with respect to these properties, plaintiffs are bound by the development agreement (§ 65868.5) and thus meet the definition of "privies." However, for purposes of collateral estoppel, the determination that a party is in privity with another is fundamentally a policy decision.

(*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849.) Stated differently, the fact that a party is in privity with another is not in itself sufficient to warrant application of the doctrine. Collateral estoppel is an equitable concept based on fundamental principles of fairness. (*Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 942.) Even if all of the threshold requirements are met, "the public policies underlying collateral estoppel—preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation—strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy." (*Lucido, supra,* 51 Cal.3d at p. 343.) The doctrine will not be applied if its application would not serve its underlying fundamental principles. (*Gikas v. Zolin*, *supra*, at p. 849.)

Here, policy considerations override plaintiffs' status as privies of Border. If the question whether the development agreement waives compliance with the Government Claims Act had been litigated and decided on its merits in either of the prior cases, we would not hesitate to conclude that plaintiffs are bound by the prior judgment. However, the issue was not decided on its merits in either case.[10] As plaintiffs point out, because all purchasers of property within Border Business Park are Border's successors in

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[10] We are at a loss to understand how the City can contend that in our opinion in *Border v. San Diego*, we "expressly rejected the argument that the terms of the Development Agreement 'waived' or 'excused' compliance with the Claims Act." We did not; rather, we held only that Border was barred from raising the issue because it failed to raise it in the earlier litigation. (*Border v. San Diego*, *supra*, 142 Cal.App.4th at pp. 1565-1566.)

interest, if we rely on privity alone to determine whether collateral estoppel should apply, no one—even a property owner which is unquestionably not an "alter ego" of Border (see fn. 11, *post*)—will ever be able to litigate the merits of the waiver issue. The integrity of the judicial system is not best preserved by applying collateral estoppel under these circumstances. (*Lucido*, *supra*, 51 Cal.3d at p. 343.) For this reason, we conclude that plaintiffs are not barred by collateral estoppel from asserting that the development agreement waives the Government Code claim presentation requirement.[11] However, as we discuss next, we reject their contention on its merits.

The Language of the Development Agreement Does Not Support Plaintiffs' Contention That the Parties to the Agreement Intended to Waive Compliance With the Government Claims Act

Plaintiffs contend that the development agreement contains provisions negotiated between Border and the City which those parties intended to waive compliance with the claims presentation procedure of the Government Claims Act, although the agreement does not explicitly so state. They contend that a contract with a public entity may waive compliance with the Act without doing so expressly, if the contract contains an alternative claims procedure as authorized by the Act. (See, generally, *Arntz Builders v.*

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[11] The City also alludes to but does not rely upon its contention that the trial court in *Border v. San Diego* found that National and "the other De La Fuente family entities" are the alter egos of Border and vice versa. As we discuss in connection with the inverse condemnation cause of action, we agree that plaintiffs are in privity with Border for that reason as well. However, that additional basis for finding privity does not affect our conclusion that overriding policy considerations make application of collateral estoppel inappropriate.

City of Berkeley (2008) 166 Cal.App.4th 276, 285-292 (*Arntz*).) They contend that the language of the agreement supports this interpretation, or, in the alternative, that extrinsic evidence is admissible to prove that the language is latently ambiguous and that the parties to the agreement intended to waive compliance with the Government Claims Act.

Section 930.2 provides that "[t]he governing body of a local public entity may include in any written agreement to which the entity . . . is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims. The written agreement may incorporate by reference claim provisions set forth in a specifically identified ordinance or resolution theretofore adopted by the governing body." Section 930.4 provides in part that "[a] claims procedure established by agreement made pursuant to Section 930 or Section 930.2 exclusively governs the claims to which it relates." If the contract includes a claims procedure pursuant to section 930.2, a statutory claim is not required as a prerequisite to filing suit unless the contract expressly requires presentation of a statutory claim as well. (*Arntz, supra,* 166 Cal.App.4th at p. 292.)

In this case, plaintiffs alleged that "As part of the negotiations for the Development Agreement, and pursuant to Government Code section 930.2, the parties agreed that any party could seek judicial relief without the necessity of . . . filing claims pursuant to [the Government Claims Act]. Thus, paragraph 9.5 of the Agreement states in pertinent part: [¶] 'Institution of Legal Action: In addition to any other rights or remedies, either party may institute action to cure, correct or remedy any default, to

enforce any covenants or agreements herein or to enjoin any threatened or attempted violation thereof; to recover damages for any default; or to obtain remedies consistent with the purpose of this Agreement.'" Elsewhere, plaintiffs alleged that the parties "negotiated for and agreed that no failure or delay by any party in asserting its rights under the Agreement would constitute a waiver of the right to sue," and that by doing so, the parties intended to abrogate the application of all Government Code requirements. They referred to paragraph 9.1.3 of the agreement, which states, "Except as otherwise expressly provided in this Agreement, any failure or delay by the other party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies or deprive such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies."

Plaintiffs contend that their allegation that the parties to the agreement intended these paragraphs to waive compliance with the Government Claims Act is sufficient to withstand the demurrer. They cite *Aragon-Haas v. Family Security Ins. Services, Inc*. (1991) 231 Cal.App.3d 232, which holds, in part, that where a complaint is based on a written contract which is set out in full in the complaint or attached to the complaint, "a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning [of] which the instrument is reasonably susceptible." (*Id*. at p. 239.) Whether a contract is ambiguous is a question of law for the court, however. (*Ibid*.) So, too, is the question whether contract language is reasonably susceptible of the

meaning urged by the party: "'When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is "reasonably susceptible" [of] the interpretation urged by the party. If it is not, the case is over.' [Citation.]" (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393.) If the court determines that the language *is* reasonably susceptible of the meaning the party ascribes to it, extrinsic evidence is admissible to prove that the parties intended that meaning. (*Id.* at p. 391.) Here, the trial court apparently found that the language of the agreement was *not* reasonably susceptible of the meaning plaintiff ascribes to it: It found that the agreement contains no provision which excuses compliance with the Government Claims Act. We agree; neither the provisions quoted above nor paragraph 9.1.1, on which plaintiffs also rely (see below), is reasonably susceptible of plaintiffs' interpretation.

Paragraph 9.1 of the development agreement provides, in part, that if either party defaults or breaches the agreement or any of its terms and conditions, the party alleging the breach "shall" give the other party "not less than thirty (30) days" notice of the default, specifying the nature of the alleged default and, "where appropriate, the manner and period of time in which said default may be satisfactorily cured." Paragraph 9.1.1 provides that after notice of default and the expiration of the cure period, the noticing party may institute legal action or give notice to terminate the agreement. Despite the apparently mandatory language[12] of paragraph 9.1, however, paragraph 9.1.3 provides that "Failure or delay in giving Notice of Default pursuant to this section *shall not*

[12] The agreement states that "shall" is mandatory, while "may" is permissive.

constitute a waiver of any default. Except as otherwise expressly provided in this Agreement, *any failure or delay by the other party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies or deprive such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies*." (Italics added.) Paragraph 9.5 also provides that "[*i*]*n addition to any other rights or remedies*, either party may institute legal action to cure, correct or remedy any default" or to obtain damages or any other remedy. (Italics added.)

The language of these provisions is not reasonably susceptible of the meaning plaintiffs ascribe to it for two reasons. First, paragraph 9.1 does not provide a procedure for the non-public entity party—i.e., the plaintiffs—to make claims for money or damages in lieu of the statutory claims procedure; rather, it provides a procedure for *either* party to notify the other of a default in order to permit the other party to cure the default. Second, the notice and cure procedure is neither mandatory nor exclusive: If a party chooses not to give notice of default and an opportunity to cure, it may instead institute legal action. Section 930.4 provides that an alternative claims procedure within the meaning of section 930.2 shall be the exclusive means of addressing claims to which it relates. Because the development agreement expressly allows the parties to bypass the notice and cure procedure, it does not provide an exclusive means of addressing claims and does not comply with those statutes. Consequently, the agreement is not reasonably susceptible of the interpretation that the parties intended to supplant the claims

presentation procedures provided for in the Government Claims Act. And, because the provision does not comply with sections 930.2 and 930.4, the agreement's silence as to whether plaintiffs are required to present a statutory claim before commencing litigation cannot be bootstrapped into a waiver of the statutory claims procedure. (Cf. *Arntz*, *supra*, 166 Cal.App.4th at p. 292.)

Because the contractual language is not reasonably susceptible of the meaning plaintiffs ascribe to it, we reject their contentions that the trial court was required to accept their allegation that the agreement waives compliance with the Government Claims Act or in the alternative that they should be allowed to prove by means of extrinsic evidence that the parties to the agreement intended to waive compliance with the Act. (*Dore v. Arnold Worldwide, Inc.*, *supra*, 39 Cal.4th at pp. 391, 393.) The demurrer was not improperly sustained on that ground.

National's Government Code Claim Substantially Complies With the Requirements of Section 910

The trial court sustained the demurrer in part because National's claim failed to state the date of the occurrence giving rise to the claim, as required by the claims act. The court held that substantial compliance does not suffice. We disagree; substantial compliance is all that is required and National's claim does provide sufficient information to permit the City to investigate and evaluate the claim.

Section 945.4 provides that "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in

accordance with . . . Section 910 . . . until a written claim therefor has been presented to the public entity and has been acted upon by [the entity], or has been deemed to have been rejected by [the entity]." Section 910 requires that the claim state the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted" and provide "[a] general description of the . . . injury, damage or loss incurred so far as it may be known at the time of presentation of the claim." Because the purpose of the claim is to give the government entity notice sufficient for it to investigate and evaluate the claim, not to eliminate meritorious actions, strict compliance with section 910 is not required. Rather, the statutes should be given a liberal construction to permit full adjudication on the merits, and as long as the policies of the claims statutes are effectuated, substantial compliance is all that is required. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 446, 449 (*Stockett*); *State of California v. Superior Court (Bodde)*, *supra*, 32 Cal.4th at p. 1245.)

National's claim describes the development agreement entered into by Border and the City, stating that the agreement was entered into on or about November 10, 1986, approved by the City by ordinance O-16748 and duly recorded. The claim goes on to describe National's interest under the development agreement. It then states that the City breached the agreement "in or about May, 1997" by imposing permit requirements in contravention of the agreement's provision that the properties would not be subject to ordinances enacted after the execution of the agreement in derogation of the property owners' ability to develop their properties. It states that the City breached that provision

again "on or about August 19, 1998." It describes in detail the requirements the City imposed. It then goes on to describe a number of other acts by the City which are alleged to have been in contravention of that provision of the agreement. It does not state specific dates on which these acts took place. However, it does state that those breaches resulted from application of "later versions" of the development permit. Coming, as this statement does, immediately after National's description of new requirements imposed pursuant to the development permit issued on or about August 19, 1998, a fair reading of the claim indicates that the subsequent requirements were imposed after August 19, 1998, but before April 16, 1999, the date of the claim. This provides sufficient information to permit the City to investigate and evaluate National's claims.[13] That is all that is required. (*Stockett*, *supra*, 34 Cal.4th at pp. 446, 449.)

Plaintiffs May Rely On National's Government Code Claim

The trial court sustained the demurrer in part because the current plaintiffs did not allege that they presented a Government Code claim. The court held that the current plaintiffs cannot rely on the claim presented by the original plaintiff, i.e., National. Plaintiffs contend that as National's assignees and successors in interest, they are entitled to rely on the Government Code claim presented by National. We agree, in part.

The purpose of the claim presentation requirement of the Government Claims Act (§§ 910, 945.4) is "'to provide the public entity sufficient information to enable it to

[13] Because we have concluded that the claim substantially complies with the date requirement, we need not address plaintiffs' contention that the City waived any defect in the claim.

adequately investigate claims and to settle them, if appropriate, without the expense of litigation.' [Citation.]" (*Stockett , supra,* 34 Cal.4th at p. 446.) An additional purpose is to allow the public entity to take the potential claim into account in its fiscal planning. (*San Diego Unified Port Dist. v. Superior Court* (1988) 197 Cal.App.3d 843, 847 (*San Diego Unified Port Dist.*).) To effectuate these purposes, each individual who has suffered injury from a single occurrence or transaction is normally required to present a separate claim. This is because each individual's claim for damages will be different, and the extent of potential damages will be unknown to the public entity in the absence of a claim for each individual. (*Id.* at pp. 850-851.) And, under some circumstances, the potential liability may be of a different kind. (See *Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1992) 8 Cal.App.4th 729, 733-734, and cases discussed therein.)

If, however, the second person "stands in the stead" of the original claimant and that person's right of action is not separate and independent but is rather identical to and wholly derivative of the original claim, the requirements of the claim statutes have been satisfied by the original claim. (*Smith v. Parks Manor* (1987) 197 Cal.App.3d 872, 881.) For example, because a subrogee's claim is identical to and entirely derivative of the claim of the injured person, the subrogee need not present a separate Government Code claim but may rely on the claim presented by the injured person. (*Ibid*.; accord, *San Diego Unified Port Dist., supra,* 197 Cal.App.3d at pp. 846-848.) Likewise, an assignee of a claim steps into the shoes of the assignor, "'taking [its] rights and remedies, subject

to any defenses which the obligor has against the assignor prior to notice of the assignment.' [Citation.]" (*Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096, italics omitted.) Similarly, to the extent that a successor in interest in real property is pursuing claims of his or her predecessor with respect to the property, the successor's claim is not independent but is merely derivative of the predecessor's claim. (See fn. 7, *ante*, discussing Code Civ. Proc., § 368.5.) Accordingly, as successors in interest with respect to the property and as assignees of National's claims based on the development agreement, plaintiffs are entitled to rely on National's Government Code claim. However, this is true only with respect to breaches of the agreement which had occurred as of the date of National's claim. Any breaches of the agreement which occurred only after plaintiffs succeeded National as the owners of the property are not derivative of National's claim, and plaintiffs cannot rely on National's claim to satisfy the requirements of the Government Claims Act. Rather, they were required to present separate Government Code claims to assert their own claims. (*San Diego Unified Port Dist., supra,* 197 Cal.App.3d at pp. 850-851; *Nguyen v. Los Angeles County Harbor/UCLA Medical Center, supra,* 8 Cal.App.4th at pp. 733-734.)

There is another reason that separate claims were required as a prerequisite to suit as to breaches which occurred after the special purpose entities succeeded National as owners of the properties: The facts underlying any cause of action for which a Government Code claim is required must be "fairly reflected" in the claim. (*Stockett, supra*, 34 Cal.4th at p. 447.) The complaint may not "'premise civil liability on acts or

omissions *committed at different times or by different persons than those described in the claim*' . . . . [Citation.]" (Italics added.) (*Ibid.*)

Despite this well-established rule, plaintiffs contend that a new Government Code claim is not required for "post-claim breaches of the same contract." The cases they cite—*Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, and *Amador Valley Investors v. City of Livermore* (1974) 43 Cal.App.3d 483—do not support that contention.

Amador Valley Investors v. City of Livermore, *supra*, 43 Cal.App.3d 483 (*Amador Valley*), does not involve a breach of contract; it is a tort case. In that case, the plaintiffs sued the city for repeatedly discharging treated sewage water onto property they planned to develop. (*Id.* at p. 488.) On appeal, the city contended that the action was time-barred because the Government Code claim was submitted more than one year after the first incident. The court held that a cause of action "emanated from each discharge" because each incident not only enhanced damage already done but added new damage. The court concluded that the plaintiffs could submit their claim after the discharges ceased, and could recover for damages incurred within one year prior to the date the claim was submitted. (*Id.* at pp. 489-490.) (The opinion is unfortunately vague as to the details, but it appears that the discharge of treated sewage water began in May 1967 and continued through June 11, 1968. The Government Code claim was apparently submitted on June 28, 1968, in that the court held that the plaintiffs could recover for damages incurred on or after June 28, 1967. (*Id.* at p. 490.)) The court did not, however, hold that the

plaintiffs could base their complaint on any sewage water discharges which occurred after the claim was submitted. Thus, the case not only does not involve "post-claim breaches of the same contract," it does not even provide an analogy on which plaintiffs could base their argument.

Ocean Services Corp. v. Ventura Port District, *supra*, 15 Cal.App.4th 1762 (*Ocean Services*) does involve a claim for breach of contract. It does not, however, hold that "post-claim breaches of the same contract" do not require a new Government Code claim. Rather, in the pertinent portion of the opinion, it holds that "[a] new statutory claim was not required for each *damage* flowing from the contractual breach" and "a plaintiff who suffers continuing damages [from the same breach of a contract] may be awarded damages accruing after submission of the claim." (*Id.* at p. 1777, italics added; p. 1778.) It cites *Amador Valley*, *supra*, 43 Cal.App.3d 483 as authority. (*Ocean Services*, *supra*, at p. 1778.) Its holding is actually based, however, on *Bellman v. County of Contra Costa* (1960) 54 Cal.2d 363 (*Bellman*), a case which is discussed in *Amador Valley* (*Amador Valley*, at pp. 489-490), but on which *Amador Valley* does not actually rely for its holding.

In *Bellman*, *supra*, 54 Cal.2d 363, the plaintiff sustained damages resulting from land slippage resulting from excavation on adjoining land, beginning in 1952. The plaintiff discovered the damage in March 1954 and presented its claim in February 1957. Further slippage continued to the time of trial in April 1958. (*Id*. at p. 365.) The government claims statute then in effect required submitting a claim within a year "'after

the last item [of damage] accrued.'" (*Id.* at p. 369, citing Gov. Code, former § 29702.) The California Supreme Court held that this was not a single, continuous tort; rather, a new cause of action arose with each instance of ground subsidence and the statute of limitations ran separately for each instance. It held, however, that the "items of damage for which recovery may be had once a claim has been filed" are "those items of damage which accrued within . . . one year . . . prior to the date of filing of the required claim and also, *without the necessity of filing successive claims, on such items as accrue after that date.*" (*Bellman*, at p. 369, italics added.) "Such items as accrue" after the date of the claim refers only to items of damage from the same tortious act or breach of contract; it does not refer to post-claim acts or omissions which constitute independent torts or breaches of the contract.

While neither *Amador Valley* nor *Ocean Services* holds that no new claim need be presented for new breaches of a contract, as plaintiffs contend, *Ocean Services* and *Bellman* do support plaintiffs' contention that no new claim was required for damages incurred after National presented its Government Code claim, as long as the damages are based on a breach of the contract which first occurred before the claim was submitted: Prospective damages may be recovered without the necessity of a new claim for each newly accrued item of damages resulting from a single, continuing breach. (*Bellman*, *supra*, 54 Cal.2d at p. 369; *Ocean Services*, *supra*, 15 Cal.App.4th at p. 1778.)[14]

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[14] Plaintiffs contend that *Ocean Services* does hold that post-claim breaches of a contract do not require a new Government Code claim. We disagree. In *Ocean Services*, the court held that the public entity had waived the claims presentations requirements of

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Accordingly, to the extent that the complaint is based on breaches of the agreement which occurred after National presented its Government Code claim, the demurrer was properly sustained. However, because plaintiffs clearly can amend the complaint to allege only breaches of the agreement which are fairly reflected in the Government Code claim, it was an abuse of discretion to sustain the demurrer without leave to amend. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.)

Plaintiffs contend that the claim and the complaint do reflect the same claims. Although the complaint is generally vague as to the acts and the dates of occurrence of the acts which constitute the alleged breaches of the development agreement, it does appear that plaintiffs are seeking damages for some breaches which are reflected in National's claim. It is clear, however, that some of the alleged breaches occurred after the date of the claim. One clear example of a post-claim breach is an allegation that in 2002, the City improperly issued notices of violation to plaintiff Otay Mesa Property LP. Because the alleged breach post-dates National's claim by about three years, it is not fairly reflected in the claim. (*Stockett*, *supra*, 34 Cal.4th at p. 447.) In their opening brief, plaintiffs list a number of other allegations which clearly post-date the complaint,

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the claims act and was estopped to assert that a second claim, or an amended claim, was untimely. (*Ocean Services*, *supra*, 15 Cal.App.4th at pp. 1776-1777.) Any post-claim breaches, as far as we understand the case, were incorporated in the amended claim. If our reading of the case is erroneous, then *Ocean Services* is contrary to *Bellman*. We, of course, are bound by *Bellman.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

including some occurring in 2000 and 2001. In addition, some of their allegations may refer to different breaches than those alleged in the claim, even if the alleged breaches took place before the claim was submitted. We do not feel obligated to examine the complaint in detail to determine which allegations are fairly reflected in the claim and which are not. It suffices to say that on remand, plaintiffs may amend their complaint but must limit their allegations to breaches of the agreement which took place before the date of National's Government Code claim *and* which are fairly reflected factually in National's claim.

The Judgment Cannot Be Affirmed On the Ground That the Claim Is Time-barred

The City contends that the complaint shows on its face that many of the alleged breaches accrued more than one year before the Government Code claim was presented and that the breach of contract cause of action is therefore barred by the statute of limitations.

The City is correct that a claim for breach of contract must be presented within one year after the accrual of the cause of action. (§ 911.2, subd. (a).) Because the City did not assert that ground in its demurrer, however, we may not affirm the judgment on that basis. The statute of limitations is a "special defense, personal in its nature," which may be waived. The defendant must "affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived." (*Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 744-745.) For that reason, a general demurrer cannot be sustained on the ground that the claim is barred by the statute of limitations

unless the demurrer specifically relies on that ground. (*Burke v. Maguire* (1908) 154 Cal. 456, 462 [dictum, discussing origin of rule]; see also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 962, p. 375.)

Camsi IV v. Hunter Technology Corp. (1991) 230 Cal.App.3d 1525, on which the City relies, does hold that a judgment based on an order sustaining a demurrer can be affirmed on the ground that the claim is time-barred, even if the trial court did not rely on that ground. (*Id.* at p. 1533.) However, in that case, the defendant asserted the statute of limitations in its demurrer. (*Ibid.*) Consequently, that case has no application here.

In any event, plaintiffs may amend their complaint to exclude any time-barred claims. If they fail to do so, the City may demur on that basis.

THE INVERSE CONDEMNATION CAUSE OF ACTION IS BARRED BY RES JUDICATA

"'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Here, the trial court sustained the demurrer as to the inverse condemnation cause of action because it concluded that the claim is "barred by res judicata under *Border Business Park*."[15] Plaintiffs contend that the ruling

[15] The ruling states, "The . . . cause of action for inverse condemnation . . . fail[s] to state facts sufficient to constitute a cause of action. [The cause of action is] barred by res judicata under *Border Business Park*." Although it is possible to read the ruling as stating two grounds for sustaining the demurrer—factual insufficiency and res judicata—the City's demurrer asserts only that the cause of action fails as a matter of law because it

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was erroneous for the "same reasons" they asserted that res judicata does not bar them from litigating whether the City waived the Government Claims Act in the development agreement, i.e., because they were neither parties to the litigation in *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538 nor in privity with Border.

In our discussion of the application of collateral estoppel to the claim that the development agreement waived compliance with the Government Claims Act, we held that plaintiffs are in privity with Border with respect to the development agreement because, as successors in interest to properties which are the subject of the development agreement, they are bound by and benefitted by the development agreement. The inverse condemnation claim is independent of the development agreement, however, and a finding of privity for this purpose must be based on different facts. In its demurrer, the City contended that plaintiffs are in privity with Border because in *Border v. San Diego*, National was declared an alter ego of Border and of Roque De La Fuente, II, and because the trial court in that matter made National a party to the litigation. Plaintiffs' opening brief addresses these contentions. However, the City's brief does not respond to plaintiffs' arguments but merely refers, in a footnote, to the alter ego instruction given by the trial court in *Border v. San Diego*. The City contends, primarily, that plaintiffs have admitted the preclusive effect of *Border v. San Diego* and that they have admitted a

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is barred by res judicata. Accordingly, we infer that the court intended to sustain the demurrer only on that ground. The City does not contend otherwise and makes no argument that the complaint fails to state a cause of action on any ground other than res judicata.

successor-in-interest relationship between themselves, National and Border, which, the City contends, in itself suffices to establish privity. Although we could deem the alter ego issue waived because the City does not assert it, it appears to have been a major bone of contention in this extremely contentious litigation. Because we are remanding for further proceedings, we will address the issue.

Plaintiffs do not dispute that National was one of the "De La Fuente family business entities" which the court in *Border v. San Diego* found to be an alter ego of Border and of Roque De La Fuente II. We agree with plaintiffs, however, that the trial court in *Border v. San Diego* did not make National a party to that action. Briefly stated, Border's theory was that the measure of damages was the value of property it lost as a result of the City's breach of the development agreement and inverse condemnation. The City's position was that Border and other business entities controlled by Roque De La Fuente II were all alter egos of De La Fuente and of each other, and that because the "lost" properties were purchased by alter egos of Border, Border had in effect suffered no losses. The trial court agreed with the City's position and instructed the jury that "I have determined that Roque De La Fuente, II, and the other De La Fuente family entities are the alter ego of plaintiff Border Business Park, and of each other. This means that for all purposes in your deliberations you must treat plaintiff Border Business Park and these other entities as one and the same as Roque De La Fuente, II. [¶] In this trial the plaintiffs are Border Business Park, Incorporated, Roque De La Fuente, II, and the De La

Fuente family entities, and the defendant is the City of San Diego."[16] After the court instructed the jury, however, *the City's* attorney objected to the instruction that the De La Fuente family entities were parties. In response, the court clarified that it was not making those entities actual parties, but was merely instructing the jury to deduct from Border's damages any amounts the jury determined had been a "windfall" for an alter ego. Thus, there is no basis for the contention that the court made National a party to the action. In addition, on our own motion, we take judicial notice that the judgment filed in *Border v. San Diego* refers only to Border as the plaintiff and contains no reference to National as a plaintiff or cross-defendant. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

As noted above, plaintiffs do not dispute that the trial court in *Border v. San Diego* found that National is the alter ego of Border and vice versa. They also do not appear to dispute that if National is the alter ego of Border, they too are Border's alter egos. However, they contend that the ruling is not res judicata because National lacked standing to appeal the judgment and thus had no opportunity to challenge the alter ego ruling. Even if the ruling in *Border v. San Diego* is not res judicata as to National and plaintiffs, however, the trial court in the current action also determined that this case and *Border v. San Diego* involve the same parties, i.e., Border and its alter egos. In the

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[16] The trial court took judicial notice of a portion of the reporter's transcript from *Border v. City of San Diego* which was submitted in support of the demurrer. We take judicial notice of the portion of the reporter's transcript quoted here, which was part of the transcript judicially noticed by the trial court, and of the portions quoted below, which were submitted to this court in plaintiffs' request for judicial notice. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

current action, the City sought an order staying the action pending the resolution of post-trial motions in *Border v. San Diego*, on the ground that both actions involved the same parties and the same controversy.[17] Its motion discussed the alter ego ruling of the trial court in *Border v. San Diego*. It did not assert that the trial court in *Border v. San Diego* made the alter egos parties to the action. The court granted the motion, explicitly stating that this action and *Border v. San Diego* "involve the same parties, same subject matter and same Development Agreement." Plaintiffs have not challenged this ruling on appeal. The finding that *Border v. San Diego* involved the same issue and the same parties is sufficient to establish that res judicata applies to preclude relitigation of the issue (*Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 896), at least as to National, which was the sole plaintiff at the time of the trial court's ruling.[18]

To the extent that the special purpose entity plaintiffs are pursuing National's claims for damages, as its assignees, they are clearly in privity with National and are equally bound by the ruling: An assignee is subject to all defenses that could be raised against its assignor. (*Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 955.)

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[17] We take judicial notice of the City's motion for stay and its memorandum of points and authorities in support of the motion, filed April 30, 2001. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

[18] The court granted the stay on June 15, 2001. The first amended petition and complaint, in which the special purpose entities first became plaintiffs, was filed on or about December 2, 2005.

Moreover, with respect to their own claims for damages incurred after they succeeded National as owners of the properties, they are also bound by the prior judgment in *Border v. San Diego*. For the purposes of res judicata or collateral estoppel, privity refers "'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel. [Citations.]' [Citations.]" (*Citizens for Open Access, supra,* 60 Cal.App.4th at pp. 1069-1070.) In the final analysis, the determination of privity depends upon the fairness of binding the appellant with the result obtained in earlier proceedings in which it did not participate. (*Id.* at p. 1070.) """Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the . . . party in the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. . . .'" [Citations.]" (*Ibid.*) A party is adequately represented for purposes of privity "'if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action. [Citation.]' [Citation.]" (*Id.* at pp. 1070-1071.) To determine the adequacy of representation, we examine "'whether the . . . party in the suit which is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that . . . party had a strong motive to assert that interest. If the interests of the

parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity. [Citations.]'" (*Id*. at p. 1071.)

Here, the special purpose entities have a sufficient "identification in interest" with Border "as to represent the same legal rights." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875 (*Clemmer*).) Both suits involve property within Border Business Park, and the complaint in this case alleges inverse condemnation based on the same facts alleged in *Border v. San Diego*, i.e., the City's diversion of truck traffic bound for the Otay Mesa border crossing, resulting, allegedly, in gridlock around the business park, excessive truck traffic within the business park, and noise and diesel fumes which affected the business park and its tenants. (See *Border v. San Diego*, *supra*, 142 Cal.App.4th at pp. 1551-1552.) It cannot be denied that Border vigorously represented those interests, despite its ultimate defeat on the issue on appeal. Moreover, having joined the current lawsuit only after it was stayed in the trial court pending the outcome of *Border v. San Diego*, and after the trial court in this case determined that *Border v. San Diego* involved the same parties and the same issues, the special purpose entities must reasonably have expected to be bound by the final result in *Border v. San Diego*. Consequently, the requirements of due process and of privity have been met. (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1070.)

Bernhard v. Bank of America (1942) 19 Cal.2d 807, on which the plaintiffs rely, does not compel a different result. The plaintiffs assert that in *Bernhard*, the California Supreme Court stated that a successor in interest in real property is a privy of his or her

predecessor only if he or she acquires an interest in the property after rendition of a judgment affecting the property. We do not agree that this was actually the holding of *Bernhard*, in that the timing of the acquisition of the interest in the property is not the issue the court addressed. (See *id.* at pp. 810-814.) In any event, the court later held in *Clemmer*, *supra*, 22 Cal.3d 865, that the concept of privity had been expanded since *Bernhard* was decided, to refer to "a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of [res judicata]. [Citations.]" (*Clemmer*, at p. 875.)

Nor, as plaintiffs also assert, does the fact that National purchased the properties in foreclosure mean that National and its successors are not subject to "Border's liabilities," i.e., the adverse decision in *Border v. San Diego.* First, the complaint alleges that National acquired the property *either* through foreclosure or through transactions independent of foreclosure. Second, plaintiffs have not provided any authority which holds that even if the requirements for privity are otherwise met, a successor in interest to property is insulated from any preclusive effect of a prior judgment affecting the property merely because he or she acquired the property through foreclosure; *Hohn v. Riverside County Flood Control & Water Conservation Dist.* (1964) 228 Cal.App.2d 605, on which

they rely, does not involve res judicata or collateral estoppel, nor does it discuss whether a purchaser of property through foreclosure is in privity with the predecessor in interest.

Plaintiffs also contend that because the judgment in *Border v. San Diego* is not yet final, res judicata cannot apply. A judgment is final for purposes of res judicata if it is no longer subject to direct attack, i.e., if it has become final on appeal or the time to appeal has expired. (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174.) The judgment on the inverse condemnation cause of action is final; it has been finally adjudicated on appeal. The fact that the cause was remanded for a new trial on the breach of contract cause of action does not affect the finality of the judgment with respect to inverse condemnation.

Finally, plaintiffs contend that their complaint should be allowed to go forward because their complaint alleges "total gridlock," and in *Border v. San Diego*, we found the evidence insufficient as a matter of law because Border produced no evidence of total gridlock. They point out that the allegations of their complaint must be deemed to be true for purposes of a demurrer.

In *Border v. San Diego*, we found the evidence insufficient as a matter of law not merely because there was no evidence that the diversion of truck traffic produced gridlock but because there was no evidence that the truck traffic completely prevented access to the business park. (*Border v. San Diego*, *supra*, 142 Cal.App.4th at pp. 1554-1559.) As we pointed out, "The right of access is not unlimited. 'Not every interference with the property owner's access to the street upon which his property abuts and not

every impairment of access, as such, to the general system of public streets constitutes a taking which entitles him to compensation.' [Citation.] As long as there is access to the abutting road and from there to the next intersecting street in at least one direction, there is no legally cognizable impairment of access. [Citation.]" (*Id.* at p. 1557.) Here, the complaint alleges "Trucks back up for hours most days of the week *blocking streets in and around the Business* Park. . . . Truck traffic often comes to a complete standstill. Total gridlock and/or near total gridlock frequently occurs *at the intersection of Siempre Viva and Drucker Road*." (Italics added.) However, as the complaint alleges, the business park is bordered by Airway Road on the north, La Media Road on the west, Siempre Viva on the south, and Harvest Road on the east. Consequently, according to the allegations of the complaint, no matter how severe the traffic backup becomes on Siempre Viva and Drucker Road, it does not completely block access to and from the business park via *all* of the surrounding roads. Accordingly, the complaint fails to allege a legally cognizable impairment of access. (*Border v. San Diego*, at p. 1557.)

In any event, although the complaint describes the traffic backup and alleges that gridlock resulted, it does not rely on impairment of the easement of access as the basis for the cause of action. Rather, the basis for the inverse condemnation cause of action is that the diversion of traffic "around and through" the park is "not far removed from a direct physical invasion, and amounts to a nuisance that is direct, substantial and peculiar to the Business Park and the properties owned by Petitioners in the Business Park." Border relied on that theory, as well as the impairment of access theory, at trial. However, the

trial court, as trier of fact, rejected the "direct physical invasion" and nuisance theory and did not submit that theory to the jury. (*Border v. San Diego, supra*, 142 Cal.App.4th at pp. 1559-1560.) As noted above, the trial court sits as trier of fact to determine whether actions constitute inverse condemnation. (*Id*. at p. 1546, fn. 6.) Because the theory was litigated and was rejected by the trier of fact, the judgment in *Border v. San Diego* is res judicata as to that theory of inverse condemnation as well.[19]

THE JUDGMENT IS NOT REQUIRED TO REFLECT THE WRIT ISSUED ON NATIONAL'S ORIGINAL PETITION AND COMPLAINT

In August 2000, the trial court granted National's petition for writ of mandate, in which National sought to invalidate the City's requirement that National obtain a permit to engage in a commercial truck-parking operation on its property within the business park. The court issued the writ, prohibiting the City from enforcing "current codes and regulations" against National in violation of the development agreement and finding that truck parking is a use consistent with the terms of the development agreement. Plaintiffs contend that the trial court erred in refusing to incorporate the writ into the final judgment.

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[19] Plaintiffs raised these two final points—the lack of finality of the judgment in *Border v. San Diego* and the gridlock issue—for the first time in their reply brief. As a matter of policy, appellate courts will ordinarily refuse to consider issues raised for the first time in a reply brief or at oral argument. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766; *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 [Fourth Dist., Div. Two].) We have chosen to address these contentions because they are easily disposed of. However, in the future, counsel would be well advised to seek leave to file a supplemental brief to raise issues omitted from the opening brief.

An essential prerequisite to the issuance of a writ of traditional mandate or of administrative mandate is a showing that the petitioner has a "clear, present, and beneficial right" to the performance of a duty. (*Excelsior College v. Board of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1237.) The writ in this case was based on the original petition filed by National, and was granted based upon a showing that National had a present right, under the development agreement, to use its property for the purpose of a truck parking business. However, the operative complaint does not allege that National has such a right; rather, it alleges that National no longer has an interest in the properties and seeks writ relief only for the benefit of the "petitioners," i.e., the special purpose entities. Consequently, there is no basis in the operative complaint for a grant of writ relief for the benefit of National.

As the City points out, an amended complaint completely supersedes the prior complaint, and the superseded complaint may not serve as a basis for judgment. (*Bassett v. Lakeside Inn, Inc.* (2006) 140 Cal.App.4th 863, 869-870.) Accordingly, a writ issued on the basis of a superseded complaint cannot be incorporated into a judgment on the amended complaint, particularly where the amended complaint no longer supports the writ.

The single authority plaintiffs cite does nothing to support their contention. In *Hadley v. Superior Court* (1972) 29 Cal.App.3d 389 (Fourth Dist., Div. Two), the court held that "[o]nce an alternative writ has issued and an evidentiary hearing been had, it is contemplated that the proceeding shall be terminated by a judgment, not by a minute

order signed by the clerk." (*Id*. at p. 394.) This has no bearing on the issue plaintiffs have raised.

THE COMPLAINT MAY BE AMENDED TO ALLEGE FACTS DEMONSTRATING THAT PLAINTIFFS EXHAUSTED ADMINISTRATIVE REMEDIES

The trial court sustained the demurrer to plaintiffs' petition for writ of mandate because it found that the petition admits that plaintiffs failed to allege exhaustion of administrative remedies. The court cited paragraphs 62 and 86 of the complaint. Plaintiffs contend, however, that paragraphs 48, 51, 52 and 61 of the complaint allege exhaustion of administrative remedies.

The complaint seeks a writ of mandate to compel two actions: to approve the final map for "Unit 8" and to retract certain requirements imposed on plaintiffs' ability to use their properties for commercial truck parking purposes. Plaintiffs apparently withdrew their petition with respect to the approval of the final map. As to the truck parking issue, paragraph 61 of the complaint alleges that plaintiffs "have tried endlessly to resolve this dispute and have thereby exhausted all potential administrative remedies, except to the extent where it has been futile to obtain a final and administrative decision from the City Council because the City either significantly, detrimentally, prejudicially and without justification, delays issuing the ministerial permits or refuses to issue any decision denying them." Paragraph 62, which the trial court found to be an admission that plaintiffs failed to exhaust their administrative remedies, states "[Plaintiffs] have not accepted the permit or complied with its conditions pending exercise of their

(administrative remedies, if any, and) judicial remedies. As a result, [plaintiffs] have not been able to utilize their property."

We do not understand the meaning of the reference in paragraph 62 to the pending exercise of plaintiffs' "(administrative remedies, if any, and) judicial remedies." However, paragraph 61 clearly states that plaintiffs have exhausted all potential administrative remedies, "except to the extent where it has been futile to obtain a final and administrative decision from the City Council." In ruling on a demurrer, the court must construe the complaint's allegations liberally, "with a view to substantial justice between the parties." (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 414.) Liberal construction in this case requires us to disregard the apparent contradiction between the two paragraphs and to conclude that plaintiffs have not admitted failure to exhaust administrative remedies.

Nor is it an admission of failure to exhaust administrative remedies to state that plaintiffs were unable to obtain a final ruling from the administrative agency, despite their efforts to do so. The requirement of exhaustion of administrative remedies is excused under certain circumstances. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 322.) One such circumstance is where the agency, despite the efforts of the party seeking the writ, has failed or refused to reach a final decision. (*Hollon v. Pierce* (1967) 257 Cal.App.2d 468, 476; see also *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1156.) Paragraph 61 is clearly intended to allege excuse on that basis.

Paragraph 61 must, however, be amended to state explicitly what actions plaintiffs took to exhaust their administrative remedies. As the City points out, paragraphs 48, 51 and 52 of the complaint allege that plaintiffs' predecessor (i.e., National) appealed to the planning commission concerning certain conditions imposed by the City. These paragraphs contain no allegation that the current plaintiffs exhausted *their* administrative remedies. As we discussed in the preceding section, mandate lies only for a party which has a "clear, present, and beneficial right" to the performance of a duty. (*Excelsior College v. Board of Registered Nursing*, *supra*, 136 Cal.App.4th at p. 1237.) National's appeal of conditions which affected its previous interest in the property is not sufficient to constitute an allegation that plaintiffs exhausted *their* administrative remedies.[20] If plaintiffs themselves took action to exhaust their administrative remedies, they may amend the complaint to demonstrate that they did so, and, if no decision was rendered, to state facts upon which they base their allegation that the agency's refusal to act excused them from further efforts to exhaust administrative remedies.

[20] Plaintiffs' writ petition must be based on interference with their contractual rights as owners of property subject to the development agreement. Unlike the action for breach of contract, their claim for writ relief cannot be derivative of National's earlier claim. Consequently, they cannot rely on actions of their predecessor in interest to satisfy the requirements for issuance of the writ.

PARTIES' REQUESTS FOR JUDICIAL NOTICE

Except as otherwise noted herein, the parties' requests for judicial notice are denied.

DISPOSITION

The judgment is reversed as to the causes of action for breach of contract and mandate. On remand, the trial court is directed to allow plaintiffs 30 days to amend their petition and complaint as to those causes of action as stated herein. The judgment awarding attorney fees to the City is also reversed. The judgment is otherwise affirmed.

Plaintiffs are awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.